STATE OF MICHIGAN

COURT OF APPEALS

DANIEL MCCABE, d/b/a DLI DEVELOPMENT,

Plaintiff-Appellee,

and

DIMOND WAY, LLC, and RIVER RUN ESTATES HOMEOWNERS ASSOCIATION,

Plaintiffs/Counter-Defendants-Appellees,

V

HORIZONS UNLIMITED, INC, d/b/a NEW HORIZON REAL ESTATE COMPANY, and RICHARD W. REMSING,

Defendants/Counter-Plaintiffs-Appellants.

UNPUBLISHED
September 14, 2006

No. 260439
Eaton Circuit Court
LC No. 02-001623-CH

Before: Fort Hood, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's order finding them in contempt of court for violating the court's previous ruling granting summary disposition in favor of plaintiffs on their equitable action to enforce certain subdivision deed restrictions. Defendants also challenge the court's previous summary disposition rulings and the court's ruling denying their motion for disqualification of the trial court judge. We affirm in part, reverse in part, and remand.

Defendant Richard Remsing is the owner of a home in River Run Estates, a subdivision located in Eaton County. Remsing is also the registered agent for defendant Horizons Unlimited, Inc. Remsing ran his real estate business, defendant New Horizons Real Estate Company, from his home in River Run Estates. Plaintiff Daniel McCabe is also a homeowner in River Run Estates and the sole proprietor of DLI Development, the exclusive developer of River Run Estates. All of the homeowners purchased their lots subject to a "Declaration of Covenants and Restrictions of River Run Estates". Plaintiffs filed suit against defendants alleging that Remsing

violated the deed restrictions with his placement of certain business signs within River Run Estates.

Plaintiffs moved for summary disposition on their complaint pursuant to MCR 2.116(C)(9) and (10). Plaintiffs also moved for summary disposition on defendants' counterclaim pursuant to MCR 2.116(C)(8) and (10). Because the record indicates that the trial court considered evidence outside the pleadings in making its decisions, we conclude the court granted summary disposition pursuant to MCR 2.116(C)(10). Summary disposition is appropriate under MCR 2.116(C)(10) when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." This Court reviews a trial court's ruling on a motion for summary disposition made pursuant to MCR 2.116(C)(10) de novo. *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005).

On appeal, defendants assert that the trial court erred when it concluded that the deed restrictions extended to the public street in front of Remsing's home, such that he could not store a trailer on the street for more than 48 hours in a week. But, defendants have failed to cite any authority in support of their argument that the restrictions in a negative covenant cannot extend beyond the four corners of the owner's property. Thus, we conclude that the trial court did not err in finding that plaintiff was not allowed to store his trailer on the street for more than 48 hours in a week because the language of the negative covenant indicates the drafters intended for the restrictions on storage to apply throughout the subdivision. *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997) (noting that in an action to enforce a negative covenant, an agreement "grounded in contract," the intent of the drafter is controlling). Remsing agreed to relinquish certain rights when he purchased his home in River Run Estates. Storing the trailer outdoors in the subdivision for a period greater than 48 hours in a week obviously violates the contract Remsing entered and entitles plaintiffs to equitable relief. *Id*.

Defendants also challenge the trial court's ruling that the testimony of two witnesses they intended to call at the show cause hearing was irrelevant. The trial court's decision regarding the admission of evidence is reviewed for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). Evidence is relevant if it has any tendency to make the existence of a fact, which is of consequence to the action, more or less probable than it would be without the evidence. MRE 401; *Dep't of Transportation v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999). At the show cause hearing Remsing admitted that he had stored the trailer on the street in front of his home for more than 48 hours in a week since the trial court's initial ruling, but denied having stored the trailer in public view on his lot. However, McCabe testified that the trailer was stored on Remsing's lot for approximately six weeks during the summer and fall. According to defendants' trial counsel, the witnesses would have attested to the fact that the trailer was stored outside the subdivision during the summer.

The trial court's initial summary disposition ruling forbade storage of the trailer in public view on Remsing's property, but did not forbid storage of the trailer on the street. Thus, because defendant was defending against a show-cause motion alleging that he had violated the trial court's previous order, any evidence rebutting the evidence that the trailer had been stored on Remsing's property for more than 48 hours in a week was relevant. Accordingly, the trial court abused its discretion by refusing to hear witness testimony rebutting McCabe's testimony that

Remsing stored the trailer on his lot for more than 48 hours in a week during the period in question. Only if the trial court had initially ruled that the trailer could not be parked in the street would Remsing's admission that he had parked the trailer there for more than 48 hours in a week have rendered the testimony of the witnesses irrelevant at the show cause hearing.

Nevertheless, this error was harmless. The court held that defendant had violated its initial ruling in several ways, including failing to remove a brochure dispenser and by simply turning around one of the signs it had ordered removed. Defendants have not challenged the trial court's ruling on these issues. The trial court properly found that Remsing violated the court's earlier ruling, and because the trial court correctly held that the deed restriction could be applied throughout the subdivision, the trial court did not err by also ordering defendant not to park his trailer in public view anywhere in the subdivision for more than 48 hours in a week.

Defendants next challenge the trial court's ruling that they could not place an owner's identification sign on the trailer or post the home's address numbers on a large display behind the mailbox. First, defendants assert that this Court already decided these issues in their favor in a zoning case that is related to the present case that was previously appealed to this Court. *Windsor Charter Twp v Remsing*, unpublished per curiam opinion of the Court of Appeals, issued October 28, 2004 (Docket No. 249688). "The rule of stare decisis generally requires courts to reach the same result when presented with the same or substantially similar issues in another case with different parties." *W A Foote Memorial Hosp v City of Jackson*, 262 Mich App 333, 341; 686 NW2d 9 (2004). For stare decisis to control the outcome of a case, the questions presented in both cases must be essentially the same. *Sizemore v Smock*, 430 Mich 283, 291 n 15; 422 NW2d 666 (1988). Defendants' argument fails because, while the underlying facts of this case and the zoning case were the same, the issues presented were not. The zoning case only dealt with whether defendants had violated any local ordinances, and this case deals with the separate issue of whether defendants violated any of the subdivision deed restrictions. Nor does the doctrine of the law of the case apply in this situation. *Manistee v Manistee Firefighters Ass'n*, 174 Mich App 118, 125; 435 NW2d 778 (1989) (stating that under the law of the case doctrine, an appellate court's prior ruling is controlling if the "prior ruling of the appellate court concerns the same question of law in the same case").

Defendants further assert that the trial court erred by prohibiting the placement of a sign on the trailer under the deed restrictions. We agree because the relevant provision conflicts with a Windsor Township ordinance requiring that signs on trailers be imprinted with the owner's name and address for purposes of identification. This requirement is incompatible with a covenant that prohibits the placement of a sign on a trailer; thereby indicating that the restrictive covenant is against public policy. *Terrien v Zwit*, 467 Mich 56, 69 n 16; 648 NW2d 602 (2002). "Contracts founded on acts prohibited by a statute, or contracts in violation of public policy, are void." *Micheson v Voison*, 254 Mich App 691, 694; 658 NW2d 188 (2003). The trial court erred when it ordered the sign removed from the trailer.

Defendants additionally assert that the trial court erred when it ruled that the deed restrictions prohibited the manner Remsing displayed his address numbers. The deed restrictions regarding signs provide as follows:

> (b) **Signs**: No sign of any kind shall be displayed to the public view on any Lot except one professional sign of not more than one (1) square foot, one

> sign of not more than six (6) square feet advertising the property for sale or rent, or signs used by a building to advertise the property during the construction and sales period.

Because the word "sign" is not defined in the deed restrictions, we turn to the dictionary to determine the commonly used meaning of the term. *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 534-535; 676 NW2d 616 (2004).

The term "sign" is defined in relevant part as "an inscribed board, placard, or the like bearing a warning, advertisement, or other information and displayed for public view." *Random House Webster's College Dictionary* (1997), p 1201. The house numbers displayed behind Remsing's mailbox meet this definition. The house numbers appear to be inscribed on a rectangular board that is suspended from a stand made of PVC piping. The numbers are "information" in the sense that they identify the property, and the size of the installation indicates that it is intended for public view. Although the township zoning ordinance permits address signs smaller than four square feet in display surface, it is not against clear public policy to uphold a negative covenant that forbids its display because the ordinance does not require the posting of such a sign. The trial court did not err.

Defendants further assert that the reading of ex parte communications led to the trial judge being prejudiced against them, and, accordingly, that the judge should have been disqualified form hearing this case. "A judge is disqualified when he cannot hear a case impartially." *Van Buren Twp v Garter Belt, Inc*, 258 Mich App 594, 598; 673 NW2d 111 (2003).

The trial judge at the hearing on the disqualification motion admitted to having received a letter concerning this case, but stated that he discontinued reading it once he realized that it concerned the litigation. Specifically, the judge stated at the hearing on the motion for summary disposition,

> No. No, I just told ya twice that I haven't considered [the letters].
>
> * * *
>
> And, I did find one of these letters. . . . And, as far as I read was this: "Dear Judge Osterhaven: In this matter I would like to express my interest." At this point I looked to see what it was regarding. It was McCabe versus Horizon.
>
> And, then he said, "I am a home builder and property owner in River Run Estates—" and that's where I stopped reading. And, I've received three or four of these. . . . [B]ut I haven't read it, haven't considered it.

At the hearing on the motion for disqualification, the judge further explained that he did not read or consider the contents of the letter and he indicated that he decided the case based on the evidence before the court, not the letters he received. Nevertheless, defendants claim that the judge's ruling and holding of Remsing in contempt demonstrate his prejudice and bias against

defendants. Defendants have not demonstrated that the trial judge could not hear the case impartially, and the fact that the trial judge ruled against defendants is not evidence of bias against them. *Bayati v Bayati*, 264 Mich App 595, 603; 691 NW2d 812 (2004).

Defendants further argue that the judge improperly suggested that he was going to visit the subdivision in question without the parties being present. But the record reveals that the judge clearly stated on the record that because defendants would not consent to him visiting the subdivision, he did not go and see the property in question. Defendants also claim that the judge was biased against Remsing because he did not apologize for calling Remsing a jerk. After reviewing the entire record, it appears that the judge's characterization was born out of his belief that both Remsing and McCabe were being unreasonable. Further, "[c]omments critical of or hostile to counsel or the parties are ordinarily not supportive of finding bias or partiality." *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). There was nothing on the record to support defendants' allegations that the judge harbored personal prejudice against Remsing or that he personally aligned himself with plaintiffs. *Van Buren Twp*, *supra* at 598. Therefore, the trial court properly denied the motion for disqualification.

Defendants additionally assert that the trial court erred by denying their motion to amend their counterclaim. "Motions to amend should be denied only for specific reasons such as ""[1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [and 5] futility . . . ."" *Franchino v Franchino*, 263 Mich App 172, 189-190; 687 NW2d 620 (2004), quoting *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997), quoting *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973) (alteration by *Weymers*); see also MCR 2.118(A)(2).

In denying defendants' motion to amend, the court noted that the filing of the amendment was late under the scheduling order. The court went on to state it had concluded that amendment could not save defendants' cause of action, and that while the court did not agree with McCabe's tactics, "a lot of the stuff, on all of the signs, was a way to counteract what was going on from the other end, frankly. And, if it had some byproduct of interfering, I question that, frankly, that it had any interference with his business relationship." The court's comments indicate that its decision was based on concerns about undue delay and futility.

Defendants asserted that although they did not timely file the motion for leave to amend, the delay was due to the fact that the newly challenged activities did not occur until after the deadline. We agree with defendants that because the challenged activities occurred after the deadline for requesting leave to amend had passed that any delay cannot be considered "undue." This is not a case where the movant was aware of the facts supporting amendment, but failed to act. Rather, defendants moved to amend shortly after the newly challenged activities occurred. Contrast *Siewert v Sears, Roebuck & Co*, 177 Mich App 221, 222; 441 NW2d 9 (1989). Nevertheless, the trial court did not abuse its discretion by denying leave to amend, because amendment would have been futile. "An amendment is futile where the paragraphs or counts the plaintiff seeks to add merely restate, or slightly elaborate on, allegations already pleaded." *Dowkerk v Oxford Charter Twp*, 233 Mich App 62, 75; 592 NW2d 724 (1998). Futility may also be found "where, ignoring the substantive merits of the claim, [the amendment] . . . is legally insufficient on its face." *Gonyea v Motor Parts Fed Credit Union*, 192 Mich App 74, 78; 480 NW2d 297 (1991).

Defendants' counterclaim asserted that plaintiffs interfered with Remsing's business relationship or expectancy by engaging in "telephone harassment, stalking and following MR. REMSING and other licensed real estate agents in their comings and goings from his office, blocking and attempting to block MR. REMSING'S vehicles, intimidating and attempting to intimidate other real estate agents and MR. REMSING." Defendants' motion for leave to amend asserted that McCabe entered Remsing's property and moved his signs, posted signs declaring that New Horizon Real Estate is not a sales office for River Run Estates, made "hang-up" calls to Remsing's home, and made derogatory comments about Remsing.

Defendants' new factual allegations constitute mere elaboration on the allegations already pleaded. Defendants never alleged that the new factual allegations supported additional claims against plaintiffs. Rather, defendants seem to allege that the pattern of harassing and intimidating conduct by plaintiffs that allegedly interfered with Remsing's business expectancy continued even after defendants filed their counterclaim. Because the proposed amendment only elaborated on defendants' original counterclaim, amendment to assert these allegations would have been futile. *Dowkerk, supra*.

In a single sentence in their brief on appeal, defendants also assert that the trial court erred in refusing to compel plaintiffs to answer certain discovery questions. "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) (citation omitted). Because plaintiff has given this issue such cursory treatment on appeal and has failed to address the trial court's reasons for rejecting defendants' motion to compel, defendants wiaved the issue. *Badiee v Brighton Area Schools*, 265 Mich App 343, 359; 695 NW2d 521 (2005).

Defendants contend that the trial court erred in granting summary disposition in favor of plaintiffs on their complaint and on defendants' counterclaim based on the legal arguments discussed above and factual evidence contained in Remsing's affidavits. However, Remsing's factual allegations exclusively refer to the actions of others and do not establish the existence of any material facts for trial on plaintiffs' complaint. Because there was substantial and unrefuted evidence that Remsing violated the deed restrictions in multiple ways, the trial court properly granted summary disposition in favor of plaintiffs on all their claims, except for the already noted error regarding the sign on Remsing's trailer.

As for defendants' counterclaim, it included an allegation of intentional interference with a business relationship.[1] The elements of this claim are as follows:

[1] We note that defendants' counterclaim included an action for accounting from plaintiff association. However, because defendants have not addressed this claim in any manner on appeal and have cited no evidence in support of this claim, this issue has been abandoned. *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003).

> [T]he existence of a valid business relationship or the expectation of such a relationship between the plaintiff and some third party, knowledge of the relationship or expectation of the relationship by the defendant, and an intentional interference causing termination of the relationship or expectation, resulting in damages to the plaintiff. [*Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 254; 673 NW2d 805 (2003).]

"The expectancy must be a reasonable likelihood or probability, not mere wishful thinking." *Trepel v Pontiac Osteopathic Hosp*, 135 Mich App 361, 377; 354 NW2d 341 (1984). "One who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual or business relationship of another." *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984). "If the defendant's conduct was not wrongful per se, the plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference." *CMI Int'l, Inc v Intermet Int'l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002).

Remsing alleged that plaintiffs intentionally interfered with his home-based occupation from which he had a reasonable expectation of deriving future economic benefit. However, the only evidence Remsing offered of the existence of his expectation of a valid business relationship between himself and a third party with which plaintiffs may have interfered, is the fact that he saw cars enter the subdivision that would then "pause near the signs posted by Mr. McCabe, turn around and leave without stopping or inquiring of me about my real estate business."[2] This evidence is insufficient to create a question of material fact regarding whether Remsing had a valid business expectancy with a third party. Plaintiff has not offered any evidence that the occupants of these vehicles were actually interested in purchasing or selling a home, let alone that they probably would have used Remsing's services if not for the alleged interference. Because defendants' claim of an expectation of a valid business relationship is based on pure speculation and not evidence of a reasonable likelihood, the trial court did not err by granting summary disposition in favor of plaintiffs on this issue. *Trepel, supra* at 377.

We affirm the decisions of the trial court granting summary disposition in favor of plaintiffs on their complaint, except the court's decision that the identification sign had to be removed from the trailer, which we reverse. We also affirm the court's decisions denying the motion for disqualification, denying the motion to amend, denying the motion to compel discovery, and granting summary disposition in favor of plaintiffs on defendant's counterclaim.

---

[2] According to Remsing, one of his clients also informed him that he had heard that Remsing and McCabe had nearly gotten into a fist-fight, but Remsing does not allege that he lost this client's business. Thus, the alleged interference did not terminate Remsing's relationship with this third party.

We remand to the trial court for entry of an appropriate revised order. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio